No. 14-593

In the
Supreme Court of the United States

TORREY DALE GRADY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether North Carolina's satellite-based monitoring program for recidivist sex offenders constitutes an unreasonable search and seizure.

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OPINIONS BELOW

The denial by the Supreme Court of North Carolina (Pet. App. 1a) of the Petition for Discretionary Review is reported at *State of North Carolina v. Torrey Dale Grady*, 762 S.E.2d 460 (N.C. 2014). The unpublished opinion of the North Carolina Court of Appeals (Pet. App. 3a) is reported at *State of North Carolina v. Torrey Dale Grady*, 2014 N.C. App. LEXIS 467 (N.C. Ct. App. May 6, 2014) and is also reported in table format at 759 S.E.2d 712 (2014). The Judicial Findings and Order as to Satellite-Based Monitoring When There Has Been No Prior Determination (Pet. App. 8a) issued by the trial court is unreported.

STATEMENT

Petitioner argues that the State of North Carolina's satellite-based monitoring ("SBM") program constitutes a search within the meaning of the Fourth Amendment and that the purported search is unreasonable when SBM enrollment is imposed without an express contemporaneous finding that the offender poses a threat to society. Neither the factual record in this case nor the relevant decisions by this Court supports such contentions.

Petitioner was indicted in 2006 for statutory rape and taking indecent liberties with a child. Petitioner pled guilty to one count of taking indecent liberties with a child. Petitioner was sentenced to an active term of imprisonment of thirty-one to thirty-eight months and was unconditionally released in 2009.

Petitioner was notified by the North Carolina Department of Correction in 2010 that an SBM determination hearing had been scheduled pursuant to N.C.G.S. § 14-208.40B (2013). The notice indicated that the Department had made the initial determination that Petitioner was a recidivist as defined by N.C.G.S. § 14-208.6(2b) (2013) based on both his 2006 conviction and an earlier 1997 conviction for second-degree sexual offense. Petitioner was subsequently charged with failing to maintain his address with North Carolina's sex offender registry and pled guilty to the charge. As a result, Petitioner was sentenced to an active term of imprisonment of twenty-four to twenty-nine months, from which Petitioner was unconditionally released.

Petitioner's court-appointed public defender filed a document in 2013 entitled Motion to Deny Satellite-Based Monitoring Application and Dismiss Proceeding ("the Motion"). The Motion included statements abut the legislative history of the SBM program. The Motion additionally recited various "facts" about the conditions and restrictions imposed on an offender enrolled in the SBM program, indicating that the "facts" were "described in the majority and dissenting opinions of the decision of the North Carolina Supreme Court in *State v. Bowditch*, 364 N.C. 335, [700 S.E.2d 1] ([N.C.] 2010)." The Motion also raised a litany of constitutional rights Petitioner claimed would be violated if he were ordered to enroll in the SBM program including:

> (5) That in light of the inordinately intrusive nature of satellite-based monitoring including

> (a) its continuous tracking of the offender through the GPS device and (b) its requirement that the offender permit periodic entry of his home by an employee or agent of the State for inspection and maintenance of equipment, the imposition of the monitoring upon [Petitioner] violates his rights to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment of the United States Constitution and Article 1, Section 20 of the North Carolina Constitution. *Cf.*, *Bowditch*, 364 N.C. 335, [700 S.E.2d 1], *State v. Martin*, ___ N.C. App. ___, 735 S.E.2d 238 ([N.C. Ct. App.] 2012).

In addition, attached as an exhibit to the Motion was a form purporting to set forth the guidelines and regulations for unsupervised offenders subjected to SBM enrollment. That form was undated and unsigned and bears an issue date of "12/07."

The State conducted an SBM determination hearing pursuant to N.C.G.S. § 14-208.40B. After a brief presentation by the State of the existence of Petitioner's prior convictions, Petitioner's counsel conceded that those convictions qualified Petitioner as a recidivist under North Carolina law. Immediately thereafter, Petitioner's counsel argued that "the imposition of the GPS monitoring device itself and the 24/7 tracking is unreasonable search and seizure under both the state and federal constitutions," specifically directing the trial court's attention to this Court's decision in *United States v. Jones*, 132 S. Ct. 945 (U.S. 2012). Petitioner's counsel presented no

witness testimony and no additional documentary evidence describing anything about the equipment *currently* in use within the SBM program, the guidelines and regulations for unsupervised offenders in 2013, or the restrictions, if any, imposed on an offender as a result of enrollment in the program.

The trial court denied the Motion and ruled that Petitioner's 1997 conviction for second degree sex offense, combined with his 2006 conviction for taking indecent liberties with a child, qualified him as a recidivist. Based on this finding, the trial court ordered that Petitioner enroll in the SBM program for the remainder of his natural life. A unanimous panel of the North Carolina Court of Appeals affirmed the trial court's ruling in an unpublished opinion finding that it was bound by that court's earlier decision in *State v. Jones*, 750 S.E.2d 883 (N.C. Ct. App. 2013), which rejected the argument Petitioner raises here. (Pet. App. 3a). Petitioner sought discretionary review by the Supreme Court of North Carolina. That Court granted the State's motion to dismiss the appeal for lack of a substantial constitutional question and denied the petition. (Pet. App. 8a)

REASONS FOR DENYING THE PETITION

The decision below is not in conflict with any decision of another state court of last resort, any circuit court, or this Court. The near-complete absence of any factual record makes this case a poor vehicle for resolving the constitutional question presented. Review by this Court is not warranted.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT OR ANY CIRCUIT COURT.

Petitioner has failed to demonstrate that the Supreme Court of North Carolina's denial of discretionary review – or the decision of the North Carolina Court of Appeals rejecting a Fourth Amendment argument predicated on this Court's decision in *United States v. Jones* – conflicts with a decision of the highest court of any other State or with any federal court. Petitioner cites to no case whatsoever from **any** jurisdiction other than North Carolina in which sex offender satellite-based monitoring has been analyzed in a Fourth Amendment context since *United States v. Jones* was decided. In fact, only one other State court of last resort appears to have addressed the issue at all and, then, only in a dissenting opinion. *State v. Dykes*, 744 S.E.2d 505, 511 (S.C. 2013) (Hearn, J., dissenting).

Moreover, Petitioner has shown no reliance by any other jurisdiction on either the holding of the North Carolina Court of Appeals below or its interpretation of this Court's Fourth Amendment jurisprudence. Therefore, it would appear that any decision regarding the North Carolina courts' interpretation of the applicability of *United States v. Jones* to satellite-based monitoring for sex offenders has had no direct or indirect impact elsewhere.

II. THE DECISION BELOW IS NOT A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

A variety of factors make the instant petition a poor vehicle for resolving the question presented. Petitioner has established no factual record outlining the specifics of North Carolina's SBM program, how it operates, the equipment it uses, or the scope of any restrictions it imposes on an enrolled sex offender. Instead, Petitioner relies on the description of the program as it existed in 2009, as outlined in *State v. Bowditch*, 700 S.E.2d 1 (N.C. 2010).

In *Bowditch*, the Supreme Court of North Carolina had before it an evidentiary record consisting of live testimony from three witnesses, including the administrator of the program. *Id.* at 3. The testimony itself covered a variety of topics including, *inter alia*: (1) the equipment provided to each enrolled offender, its dimensions, and its technical aspects; (2) the extent and frequency of the maintenance required for the equipment; (3) the extent of the monitoring of an offender's movements, including how frequently the data was retrieved or the data's uses; and (4) the impact of monitoring on an offender's daily activities. *Id.* at 4-5.

Conversely, despite four years having elapsed from the issuance of the *Bowditch* opinion and the statutory

right to present evidence[1], Petitioner presented no witnesses or documentary evidence explaining the details and parameters of the current SBM program. As Petitioner notes, the entire SBM determination hearing took twenty minutes, (Pet. 4), generating an eleven-page transcript; the printed record from the appeal below consists of a mere thirty-one pages. Therefore, the "developed" record covering any particulars of the SBM program consists entirely of five-year-old information, summarized by Petitioner's trial counsel and admittedly derived entirely from the justices' various factual references from the majority and dissenting opinions in a 2010 case.

A proper assessment as to whether North Carolina's SBM program constitutes an unreasonable search and seizure in violation of the Fourth Amendment is not possible here because the factual record makes it impossible for this Court to balance the state's perceived need to monitor sex offenders and the intrusions, if any, on Petitioner and other sex offenders like him. There is no evidence whatsoever of the present-day parameters of the SBM program, no testimony about whether advances in technology have reduced the need for interruptions in the offender's life to maintain the satellite signal, no testimony about the frequency, duration, or purpose of visits by corrections officials into an offender's home, no

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[1] *See* N.C.G.S. § 14-208.40B(c) (2013) (referencing the hearing procedures in N.C.G.S. § 14-208.40A (2013) which, in subsection (a) thereto, permit an offender to present evidence to counter that presented by the State).

testimony about the size, technical capabilities, or maintenance requirements of the equipment itself, and no information about what use, if any, North Carolina makes of the information it collects via the GPS monitoring. Under these circumstances, this Court does not have an appropriate basis to determine whether North Carolina's monitoring efforts do constitute a search and, if so, whether that search is reasonable.

Petitioner's identification of an "important federal question" implicated by North Carolina's SBM program is premised entirely on his speculation about the expanding use of GPS technology by other states to monitor offenders and the suspected unwillingness of "[l]egislators or even state judiciaries to stand in the way of public pressure to implement GPS monitoring." (Pet. 13, 14) As support for his contention, Petitioner specifically cites both the fact that North Carolina's legislature unanimously enacted the SBM program and that the author of the dissenting opinion in *Bowditch*, while running for re-election, "became the subject of a television ad accusing her of 'siding with child molesters.'" (Pet. 14, 15) Petitioner extrapolates from these events that "as GPS technology advances, the public will continue to demand its use in more – and more intrusive – searches." However, the examples Petitioner cites of the "expanding use" of the technology reflect that GPS monitoring of non-sex offenders has been in place for at least five years for domestic abusers in as many as thirteen states and for gang members in California for over a decade. (Pet. 14) Accordingly, Petitioner fails

to identify a newly-developing issue requiring this Court's intervention.

Neither of the appellate courts below actually concluded, as Petitioner claims, that "lifetime GPS monitoring of Petitioner is not an unconstitutional search." (Pet. 5) Under long-standing precedent, the North Carolina Court of Appeals concluded that it lacked the authority to overturn a ruling by a prior panel of that court on the same issue before it in the instant appeal. *State v. Grady*, 2014 N.C. App. LEXIS 467, at *4-5 (citing *In re Civil Penalty*, 379 S.E.2d 30, 37 (N.C. 1989) (holding that, where a prior panel of the North Carolina Court of Appeals has decided the same issue, a subsequent panel "is bound by that prior decision"). This is because in *State v. Jones*, 750 S.E.2d at 886, the North Carolina Court of Appeals had, in fact, previously rejected the argument that the SBM program violated the Fourth Amendment under the analytical framework announced by this Court in *United States v. Jones*. There was no independent determination of the constitutionality of the SBM program by the North Carolina Court of Appeals in this case. Furthermore, because the Supreme Court of North Carolina dismissed Petitioner's appeal on the grounds that it did not present a substantial constitutional question, that court never addressed directly the question Petitioner now asks this Court to answer.

This Court has already declined the opportunity to review the constitutionality of North Carolina's SBM program. In 2010, for the reasons set forth in its opinion in *Bowditch*, the Supreme Court of North

Carolina rejected an offender's arguments that the state's SBM program was unconstitutional because it operated as an ex post facto law. *State v. Vogt*, 700 S.E.2d 224 (N.C. 2010). This Court denied the offender's petition for certiorari. *Vogt v. North Carolina*, 131 S. Ct. 3059 (U.S. 2011).

The outdated and summary nature of the evidentiary record below and the lack of substantive analysis of Petitioner's Fourth Amendment argument by either the Court of Appeals or the Supreme Court of North Carolina makes this case an especially poor vehicle for determining whether the state's SBM program constitutes an unreasonable search and seizure in violation of the Fourth Amendment.

III. THE DECISIONS OF THE APPELLATE COURTS BELOW DO NOT CONFLICT WITH THE FOURTH AMENDMENT JURISPRUDENCE OF THIS COURT.

Assuming, *arguendo*, that this Court concludes that the courts below did expressly conclude that North Carolina's SBM program is not a search under the trespassory test outlined in *United States v. Jones*, Petitioner's identification of a conflict between those decisions and the jurisprudence of this Court is only partially complete and, at best, half right.

Without question, *United States v. Jones* held that the District of Columbia's warrantless attachment of GPS surveillance equipment to a criminal suspect's vehicle was a search under the Fourth Amendment. 132 S. Ct. at 949. However, this Court noted that "[a]

trespass on 'houses' or 'effects,' or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy." *Id.* at 951, n.5. Here, Petitioner has presented no evidence about the State's implementation of the SBM program or what information, if any, it currently obtains through the monitoring process. Accordingly, there is no basis upon which this Court can determine whether North Carolina conducts a "search" of an offender enrolled in its SBM program.

In *United States v. Jones*, this Court expressly declined to address whether the search there was reasonable, finding that the government had "forfeited" the argument by not having raised it in the lower courts. *Id.* at 954. Therefore, whether or not North Carolina's SBM program constitutes a search under the Fourth Amendment, *United States v. Jones* does not stand for the proposition that the search at issue there was unreasonable and unlawful, let alone that the presumed searches implicated by North Carolina's SBM program offend the Constitution.

Given his failure to submit any evidence or make any substantive argument to the trial court about the current operation of the SBM program or the governmental purpose behind its implementation, Petitioner instead resorts to hyperbole to characterize the severity and offensiveness of the "trespass" resulting from the monitoring inherent in the SBM program. *See, e.g.*, (Pet. 6) ("by any reckoning, the monitoring in this case is as invasive a trespass as any

that this Court has previously considered"); (Pet. 11) (because the GPS monitoring tracks "every move made by Petitioner for the rest of his life" and the State "enter[s] Petitioner's home uninvited, it is hard to imagine a more intrusive search than that experienced by Petitioner"). Petitioner buttresses these statements with repeated citations to cases addressing bodily intrusions – buccal swabs, blood draws, fingernail scrapings, breathalyzer tests – in the context of criminal investigations. (Pet. 6) (citations omitted). Moreover, Petitioner virtually ignores this Court's Fourth Amendment jurisprudence deriving from civil settings other than to say that the Fourth Amendment applies there. (Pet. 7) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 355 (1985). *But see Veronia School District 47J v. Acton*, 515 U.S. 646, 652-64, 661 (1995) (finding reasonable a school district's compulsory drug testing of urine samples of students seeking participation in school athletic programs despite the absence of individualized suspicion of drug use where the importance of the government's interest in deterring drug use by school children could "hardly be doubted").

Petitioner boldly claims that "little evidence supports the State's contention that GPS monitoring of sex offenders furthers its legitimate governmental interest of protecting the public." (Pet. 12) In support of this assertion, Petitioner cites only to the dissenting opinion in *Bowditch* decrying the absence of evidence that the SBM program prevented harm to the public, 700 S.E.2d at 14, and a recent study of California sex offenders which, based on the data compiled, questions "the popular belief that sex offenders have a high rate

of recidivism compared to other types of felons," Robert A. Barton, et al., State of California, Office of the Inspector General, *Special Review: Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions*, at 18 (October 2014), *available at* http://www.oig.ca.gov/media/reports/Reports/Reviews/OIG_Special_Review_Electronic_Monitoring_of_Sex_Offenders_on_Parole_and_Impact_of_Residency_Restrictions_November_2014.pdf. (Pet. 12, 13) Petitioner conveniently ignores, however, the opportunity, if not the obligation, he had to adduce any evidence – statistical or otherwise – of the inefficacy of North Carolina's SBM program.

There is no case from this Court supporting Petitioner's assertion that GPS monitoring equipment worn by a convicted sexual offender and monitored by a state for the purpose of preventing harm to the public constitutes an unreasonable search under the Fourth Amendment. Accordingly, the decisions below are not in conflict with the jurisprudence of this Court.

In light of the nearly barren evidentiary record in this case and the resulting inability to conduct a careful analysis into whether, under the circumstances, North Carolina's SBM program constitutes an unreasonable search of a convicted sex offender like Petitioner, review by this Court is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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